

**SO ORDERED:**

S/5/08 Hon. George A. Yanthis  
United States Magistrate Judge.

ANDREW M. CUOMO  
Attorney General

# MEMO ENDORSED

April 28, 2008

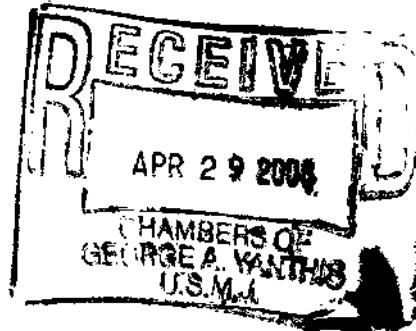
LESLIE G. LEACH  
Executive Deputy Attorney General  
Division of State Counsel

JUNE DUFFY  
Assistant Attorney General in Charge  
Litigation Bureau

By Facsimile at (914) 390-4095 to:

The Honorable George A. Yanthis  
United States District Magistrate Judge  
United States District Court  
Southern District of New York  
300 Quarropas Street  
White Plains, New York 10601

Re: Horn v. O'Brien et al.  
07 Civ. 7822 (KMK)(GAY)



Your Honor:

I am an Assistant Attorney General in the Office of Andrew M. Cuomo, Attorney General of the State of New York, counsel for state defendants Richard O'Brien and Timothy Sammon. I write to respectfully request that the Court issue a stay of discovery as to defendant O'Brien, as Investigator O'Brien, a reservist in the United States Army, has been called to active duty and has been deployed to Afghanistan. Accordingly, Investigator O'Brien is unable to meaningfully participate in his defense and a stay of discovery should be granted as to him for the reasons set forth below.

The Servicemembers Civil Relief Act, 50 Appx. U.S.C. §501 et al., formerly known as the Soldiers' and Sailors' Civil Relief Act of 1940, states as its purpose: "to enable (servicemembers) to devote their entire energy to the defense needs of the Nation and to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect the civil rights of service members during their military service." 50 Appx. U.S.C. §502. Section 522 of the act authorizes the Court to grant a stay of proceedings when the servicemember has notice. The stay applies to "any civil action or proceeding, including any child custody proceeding, in which the plaintiff or defendant at the time of filing any application under this section (1) is in military service or is within 90 days after termination of or release from military service; and (2) has received notice of the action or proceeding." 50 Appx. U.S.C. §522(a).

In the 1940s, courts recognized that the act served to authorize and direct courts to intervene to ensure that the rights and remedies of such defendants should not be impaired or jeopardized in.

the consequence of their military service. Syracuse Sav. Bank v. Brown, 181 Misc. 999, 42 N.Y.S.2d 156 (1943). More recent case law in the Southern District reflects a trend favoring staying proceedings in civil actions as to a defendant who is on active duty because the absence of that party would "materially affect his ability to conduct his defense." Franklin v. Balestrieri, 2002 U.S. Dist. LEXIS 458 at \*2 (S.D.N.Y. Jan. 14, 2002). In Kee v. Hasty, 2004 U.S. Dist. LEXIS 6385, at \*21-22 (S.D.N.Y. Apr. 14, 2004), the court denied a motion for default judgment against a defendant who was serving in the Air Force and stayed the action pending the defendant's return from his military service. There, the court only required updates as to the defendant's military status. Id. Courts have granted stays of proceedings, finding that the current war on Iraq and the national war on terror encourages judges to protect those in the military unable to meaningfully participate in proceedings against them. In Re Templehoff, 339 B.R. 49, 53 (Bank. Ct. S.D.N.Y. 2005). In Allah v. Goord, 405 F. Supp.2d 265 (S.D.N.Y. 2005), Judge Scheindlin granted a stay of the proceeding in an action pursuant to 42 U.S.C. §1983 action and the Americans with Disabilities Act brought by an inmate against corrections officers because one of the officers, who had not yet been served, was called to active military duty indefinitely and was, therefore, unable to participate in his own defense. Id. at 270, n.2.

Here, Investigator O'Brien was served with the complaint in this action, and subsequently submitted an answer to the complaint. Following his submission of that answer and before the commencement of discovery, Investigator O'Brien was summoned to active duty as part of the United States Army's 106<sup>th</sup> Regiment. He was ordered to report to Fort Bragg in January of 2008. I was informed by Investigator O'Brien, as well as by his New York State Police supervising sergeant, that sometime during the beginning of April 2008 (on a date that could not be revealed to me for security reasons), Investigator O'Brien's regiment was deployed to active combat duty in Afghanistan. The period of active duty is described on the Orders received by Investigator O'Brien as "not to exceed 400 days." A copy of the Orders received by Investigator O'Brien are annexed hereto for the Court's information. As Investigator O'Brien's status on active combat duty in Afghanistan makes it impossible for him to meaningfully participate in the discovery, I respectfully request that this Court grant a stay of all proceedings, including discovery, in this case as to him.

For all of the reasons stated above, I also respectfully seek to reserve Investigator O'Brien's right to reopen any portion of the discovery, including any deposition, or any other proceedings in this action that he was unable to participate in because of his participation in active military service.

By making this request, I am not waiving any substantive or procedural defenses that Investigator O'Brien may have to this action. See 50 Appx. §522(d).

I will be happy to provide the Court with periodic updates as to the military status of Investigator O'Brien. I thank the Court for its consideration in this matter.

Respectfully submitted,



Susan H. Odessky  
Assistant Attorney General  
(212) 416-8572

Encs.

**cc: Via Facsimile at (201) 221-8665 to:**

Michael P. Barnes, Esq., Counsel for Plaintiffs  
Counsel for Plaintiffs

**Via Facsimile at (914) 964-0563 to:**

Michael Levinson, Esq.  
Associate Corporation Counsel  
Counsel for Co-defendants

OFFICE OF THE ADJUTANT GENERAL  
STATE OF NEW YORK  
330 OLD NISKAYUNA ROAD  
LATHAM, NEW YORK 12110-2224

ORDERS 351-212

17 December 2007

O'BRIEN RICHARD D 130-64-7903 CPT HQS 106TH REGIMENT (FWD2)  
(8GNY2-113) BLDG 508 CAMP SMITH CORTLANDT MANOR NY 10567

You are ordered to active duty as a member of your Reserve Component Unit for the period indicated unless sooner released or unless extended. Proceed from your current location in sufficient time to report by the date specified. You enter active duty upon reporting to unit home station.

REPORT TO HOME STATION: 17 January 2008 , CORTLAND MANOR

REPORT TO MOB STATION: 20 January 2008 , Ft Bragg

Period of active duty: Not to exceed 400 days

Purpose: IN SUPPORT OF OPERATION ENDURING FREEDOM

Mobilization Category Code: G

Additional instructions:

- (a) You are ordered to active duty for a period of less than 30 days for mobilization processing that includes medical & dental screening and/or care.
- (b) If upon reporting for duty you fail to meet deployment medical standards (whether because of a temporary or permanent medical condition, you may be released from active duty, returned to your prior reserve status, and returned to your home address, subject to a subsequent order to active duty upon resolution of the disqualifying medical condition.
- (c) Pursuant to Presidential Executive Order of 14 Sep 01, you are relieved from your present reserve component status and ordered to active duty not to exceed 25 days for mobilization processing. Proceed from your present location in sufficient time to report by the date specified.
- (d) This is not a permanent change of station (PCS), normal PCS entitlements and allowances and relocation of family members are not authorized. Soldiers are deployed in a TCS status/unit members will travel as a group.
- (e) The soldier will be excluded from the Active Army end-strength per section 115, title 10, USC, and will not be placed on the active duty list (sections 641 (1) (D) and 620 (a), Title 10, USC).
- (f) Call 1-800-336-4590 (National Committee for Employer Support of the Guard and Reserve) or check on line at [www.ESGR.org](http://www.ESGR.org) if you have questions regarding your employment/reemployment rights.
- (g) You are ordered to active duty with the consent of the Governor of New York
- (h) Storage of household goods and POV is authorized at government expense.
- (i) If commercial mode of travel is used, individual soldier is authorized excess baggage.
- (j) POV is authorized as transportation under JPTR, para D3310. There is NO authorization for in and around mileage under this authorization.
- (k) Meals and lodging will be provided at no cost to the Soldier. Claims for reimbursement require a statement of non-availability control number.
- (l) For unresolved pay issues, contact the ARNG Pay Ombudsman at toll-free 1-877-ARNGPAY or by email at [ARNG-MILPAY@ARNG-PSC.NGB.ARMY.MIL](mailto:ARNG-MILPAY@ARNG-PSC.NGB.ARMY.MIL)

ORDERS 351-212 HQ NY NG, OTAG, 17 December 2007

FOR ARMY USE

Auth: 10 USC 12302 FUSA Perm Order #1A-07-243-042, dated 31 Aug 2007

Amendment #1A-07-243-042 (A1), dtd 01 Dec 2007

Amendment #1A-07-243-042 (A2), dtd 12 Dec 2007

### Acct class:

ACCL clas:  
Off pay/awl: 2182010.0000 01-1100 P1W1C00 11\*\*/12\*\* VFRE F3203 5570 S12120  
Off tvl/pd: 2182020.0000 01-1100 P135198 21\*\*/22\*\*/25\*\* VFRE F3203 S12120(OEF)  
Off pay/awl: 2192010.0000 01-1100 P1W1C00 11\*\*/12\*\* VFRE F3203 5570 S12120  
Off tvl/pd: 2192020.0000 01-1100 P135198 21\*\*/22\*\*/25\*\* VFRE F3203 S12120(OEF)

Sex: M

MDC-PM

RMOS/AOS/AST/LTC: 11A . 5K . YY

HOB: 38 PLEASANT AVE WALDEN

NY12586

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PBBD: 15-JUL-87  
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Comp: ARNGU

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JAMES C. LETTKO  
COL, EN, NYARNG  
Director Military Personnel

**\*\* MESSAGE \*\***

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STATE OF NEW YORK  
OFFICE OF THE ATTORNEY GENERAL  
ANDREW M. CUOMO

# FACSIMILE TRANSMISSION

DATE April 28, 2008 NUMBER OF PAGES 6  
(INCLUDING THIS PAGE)

TO Honorable George A. Yantthis FAX NO. (914) 390-4095

FROM Susan H. Odessky, AAG

CC Michael P. Barnes, Esq. FAX NO. (201) 221-8665

CC Michael Levinson, Esq. FAX NO. (914) 964-0563

**REMARKS**

Re: Horn v. O'Brien, et al., 07 CV 7822 (KMK)

**IF THERE IS A PROBLEM WITH THIS TRANSMISSION, PLEASE CONTACT**

NAME <u>Susan Odessky</u>	OFFICE <u>24A42</u>
TELEPHONE NO. (212) <u>416-8572</u>	FAX NO. (212) <u>416-6075/6076</u>

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OAG 007 (12/98)